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No. 282

In the Supreme Court of the United States

OCTOBER TERM, 1957

SALVATCRE APUZZO, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinions of the Court of Appeals (Pet. 29-54) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 28, 1957 (R. 58a). A petition for rehearing was denied on June 18, 1957 (R. 69a). The petition for a writ of certiorari was filed on July 16, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was prejudiced by a reference at his trial to a prior arrest, where the jury was carefully and emphatically instructed to disregard the reference.

2. Whether the search and seizure of policy slips was legal.

STATEMENT

Petitioner was tried on two informations embodying three counts which charged failure to pay the special tax imposed on gamblers, failure to register as a gambler, and conspiracy to commit the mentioned crimes (R. 2-5). He was found guilty by a jury on all three counts and was sentenced to 60 days imprisonment and a $3,000 fine on the first count (R. 61-62, 65). Sentence was suspended on the other counts and petitioner was placed on probation for a period of four years (R. 62, 65-66).

The evidence may be summarized as follows:

Petitioner is the proprietor of a small butcher shop in New York City and has been in that line of business for many years (R. 31, 35, 52, 6a). His alleged conspirators, Aaron and Broussard, were employed by petitioner to work behind the counter during the day (R. 13, 52).

During the period from July 28 to August 5, 1953, federal agents placed eight policy number bets with Aaron and Broussard at petitioner's butcher shop (R. 7-11, 13-15). On each occasion, except one, there were other persons in the shop making "policy" bets

at the same time (R. 7-11, 13-15). Aaron would record the bets on slips of paper taken from a 3 x 5 inch pad (R. 7, 13). The previous day's winning number was posted on the end of the scales in the shop (R. 9). The agents never saw petitioner in the shop while they were there (R. 13). On one occasion, an agent saw one parcel of meat sold (R. 12).

A few hours after the eighth bet had been placed, four agents of the Treasury Department, acting under a validly issued search warrant (Tr. 432)[1], raided the shop (R. 18-19). They found petitioner in a back room (R. 20). Petitioner readily admitted his identity but at first maintained he was just a visitor to the shop (R. 26; 2a, 8a). Later, he stated that he had recently rented the store from another person (R. 26). Over $1300 was found on petitioner when he was searched. Several thousand money wrappers and hundreds of paper pads were in the back room (R. 2a, 5a).

The agents proceeded to the front of the shop where the safe was located and asked petitioner to open it (R. 7a). At first, petitioner claimed not to know the combination, but when the agents told him it would then be necessary to break the safe open petitioner recalled the necessary dial manipulations (R. 7a). The agents found over $10,000 in a locked compartment in the safe which petitioner immediately claimed (R. 22, 4a, 8a). Some policy slips record-

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[1] The reference is to the transcript, which is on file with the record in this Court.

ing "78 individual plays" were found in another part of the safe, together with various business documents (R. 15-16).

The agents next asked for any other policy slips present in the shop. Petitioner pointed to the scale on the counter and told Broussard, who was behind the counter, to "[g]ive them the slips." Broussard removed about 150 "policy" slips from inside the scale, including the two bets made earlier that day by the agents, and handed them to the raiding party (R. 14, 17, 23, 25, 26, 50, 5a).

Petitioner stipulated at the trial that he had not registered as a gambler or paid the tax (Tr. 279-280), defending against the information on the theory that he had not known that his employees, Broussard and Aaron, were accepting bets in the butcher shop. Broussard testified that, at the time of the raid, petitioner told him to give the agents the policy slips if he, Broussard, knew about them (R. 53). There was testimony that on the day of the raid petitioner called one Isidori, his brother-in-law and employee, to obtain the safe combination, but Isidori also testified that petitioner already knew the combination (R. 55).

On direct examination, treasury agent Gianatasio, a member of the raiding party, was asked if he was present when any conversation was had with petitioner in the back room. Gianatasio answered responsively, testifying that petitioner had given his name and then said he was visiting in the store. On cross-examination, Gianatasio was again asked if he had had a conversation with petitioner in the rear of

the store. He answered affirmatively. The following exchange took place (R. 35-36):

> Q. What did you say to him and what did he say to you? A. I asked him his name. He gave me his name. I asked him his address. He gave me a Bronx address. I asked him what his business was. He told me butcher. I asked him whether he was married. I asked him if he was ever arrested before.
>
> Mr. ROSEMAN. At this time, your Honor—
>
> The WITNESS. You wanted to know what I asked him.
>
> Mr. ROSEMAN. All right.
>
> The COURT. At this time what?
>
> Mr. ROSEMAN. I don't want the witness to just keep answering. I would rather ask the questions.
>
> The COURT. You asked him what the conversation was. I didn't know that he had finished.
>
> Q. Did you tell Mr. Lemler—
>
> The COURT. Had you finished telling about the conversation?
>
> The WITNESS. No, sir.
>
> Q. Did you tell Mr. Lemler—
>
> The COURT. Just a minute. He didn't finish.
>
> A. When I asked him if he was arrested before, he told me he had been arrested for policy about 15 years ago. He didn't know the exact date.
>
> Mr. ROSEMAN. At this time I object to the testimony and move for a mistrial.

The incident just mentioned took place at the close of a day's session. At the beginning of the next session, the trial judge told the jury—after hearing argument on a motion for a mistrial—that the previous arrest should not have been brought out and

that the judge had erred in insisting that the whole conversation be uttered. He instructed the jury that an arrest "means absolutely nothing," and has no bearing on the question of guilt or innocence. He concluded his remarks by saying (R. 49):

> * * * And you are to disregard anything you heard. You can blame me for anything that occurred in that respect, because neither counsel is responsible for the fact that was brought out.

After an initial hearing before a three-judge division of the court, the Court of Appeals heard the case *en banc*, four judges participating in the decision.[2] The opinions discuss the incident described *supra*, pp. 4-6. Judges Clark and Medina held that defense counsel had invited an answer which covered the whole conversation; that the entire answer was relevant and responsive; that counsel therefore could not complain of the substance of the answer he received; and that the entire answer was admissible under the doctrine of verbal completeness (R. 44a-49a). Judge Hincks was of the opinion that the trial judge's direction for a continuation of the answer was error, but that the error was not prejudicial because of the "massive weight of evidence pointing to guilt" (R. 49a-51a). Judge Waterman concluded that error had occurred but that the trial court's later instructions cured the error (R. 51a-57a).

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[2] Judge Frank, who had voted to reverse, died between argument and opinion. Judge Lumbard had served as United States Attorney during the prosecution, and disqualified himself.

ARGUMENT

1. All four judges of the Court of Appeals who participated in the ultimate decision agreed that, in the particular circumstances of this case, there was no prejudicial error to petitioner arising out of the agent's answer with respect to his prior arrest. While there was disagreement as to whether the District Court erred in requiring the witness to complete his answer, after defense counsel had attempted to cut off the full answer to his own broad question asking for the whole conversation, there was no disagreement that reversible error had not been shown.

For present purposes, we need consider only the ground taken by Judge Waterman, who rested his holding on "the unique circumstances in this case" (Pet. 54). Assuming that evidence of petitioner's prior arrest was erroneously admitted, the trial judge adequately cured the error. He forcefully advised the jury to disregard the testimony and gave full instructions that an accused person is presumed innocent until proven guilty, and that the fact of arrest does not tend to prove guilt. It must be presumed that the jurors followed this instruction, particularly in view of the scope and character of the judge's emphatic words (Pet. 38, 47, 48-49, 54). *Delli Paoli* v. *United States*, 352 U.S. 232, 242; *Opper* v. *United States*, 348 U.S. 84, 95. The trial judge's action was therefore appropriate, and he did not abuse his discretion in refusing to grant the motion for mistrial. See *McDaniel* v. *United States*, 232 F. 2d 713, 714 (C.A. 5); *United States* v. *Giallo*, 206 F. 2d 207, 209 (C.A. 2), affirmed, 346 U.S. 929; *Aeby* v. *United*

States, 206 F. 2d 296, 300 (C.A. 5), certiorari denied, 346 U.S. 885; *Cavness* v. *United States*, 187 F. 2d 719, 722 (C.A. 9), certiorari denied, 341 U.S. 951; *United States* v. *Curzio*, 179 F. 2d 380 (C.A. 3).[3]

Petitioner's argument that he was, in some way, "exposed to the wiles or toying of overzealous or vindictive government witnesses" (Pet. 24), is unfounded. None of the four appeliate judges accepted this contention (see Pet. 43). And in fact the government witness did not volunteer testimony which was unresponsive to the question asked him; the answer was actually responsive to defense counsel's broad inquiry on cross-examination. That the court did not immediately accede to counsel's attempt to limit his own original question does not alter the fact that it was not the witness, but defense counsel, who brought the whole of the agent's conversation with petitioner into the case.

2. Petitioner also contends that the warrant under which the government agents searched his shop and seized the policy slips was illegal. The gist of his argument is that the federal officers were attempting to obtain evidence of a state crime—operation of a lottery—which is not a federal offense, and that the items seized were neither contraband nor items "[d]e-

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[3] For these reasons, such cases as *Brown* v. *United States*, 83 F.2d 383 (C.A. 3); *Parilla* v. *United States*, 280 Fed. 761 (C.A. 6); and 23 C.J.S. Criminal Law § 1070, declaring that inadmissible testimony should be stricken, and *United States* v. *James*, 208 F. 2d 124 (C.A. 2), holding that the *prosecution* may not introduce evidence of prior arrest absent some good reason, do not apply at all to this case.

signed or intended for use or which * * * [had] been used as the means of committing a criminal offense * * *". Rule 41(b), Federal Rules of Criminal Procedure.

Prior to trial, petitioner moved for the return of the items seized at the time of the search. The motion was denied (Pet. 56-57) on the ground that, although operation of a lottery is not *per se* a federal offense, the operation of a lottery is a means of committing the federal offenses of evasion of the gambling tax or failure to register as a gambler. This ruling, which was accepted by the Court of Appeals without discussion, was clearly sound.

The search was not a general exploratory search for incriminating evidence.[4] It was conducted under a proper warrant, for the purpose of seizing items used in the commission of a crime. The tax upon the operators of a lottery is a constitutional exercise of the taxing power. *United States* v. *Kahriger*, 345 U.S. 22. While operation of a lottery is not, in itself, a federal offense, it is a federal crime to operate without first registering and obtaining a proper license. Therefore, the policy slips seized under the warrant were not mere evidentiary materials. They were being used to record bets and were "* * * the instrumentalities and means by which a crime [was

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[4] In *Kremen* v. *United States*, 353 U.S. 346, cited by petitioner, federal agents undertook a general exploratory search of the cabin occupied by Kremen (and the other petitioners), as an incident to their arrest, and made a wholesale seizure. Here, the search was pursuant to a proper warrant, and was not exploratory in nature; the seizure was limited.

being] committed * * *". *Harris* v. *United States*, 331 U.S. 145, 154; *Marron* v. *United States*, 275 U.S. 192; see also *Sanders* v. *United States*, 238 F. 2d 145, 147 (C.A. 10). As such, they were subject to seizure under Rule 41(b), *supra*.[5]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[5] In *United States* v. *Lefkowitz*, 285 U.S. 452, 465, involving a general exploratory search without a warrant, the Court noted that, "Though intended to be used to solicit orders for liquor in violation of the [National Prohibition] Act, the papers and other articles found and taken were in themselves unoffending." Here, as already noted, the policy slips taken under the warrant were actually being used in the commission of an offense. *Boyd* v. *United States*, 116 U.S. 616, holds that private papers are not subject to compulsory production equivalent to a search and seizure. The opinion mentions "lottery tickets" as an example of contraband which can be seized. 116 U.S. at 624.

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